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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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REPLY TO COUNTER-STATEMENT OF THE CASE

Some of the statements made by Plaintiffs in their "Counter-Statement of the Case" are incomplete and misleading.[1] Accordingly, we find it necessary to make the following clarifications.

1. Plaintiffs make constant references to "the union." (Plaintiffs' Brief, p. 1, n. 1). Petitioner IFFA did not

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[1] References to the individual Respondents' Brief in Opposition will be made (Plaintiffs' Brief, p. —). References to Respondent TWA's Brief in Opposition will be made "TWA's Brief, p. —."

come into existence until April 1, 1977. Prior to that date, another union represented TWA's flight attendants.

2. Plaintiffs also leave the impression that this Union represents the flight attendants at American Airlines. IFFA has never represented American's flight attendants.

3. Plaintiffs also imply that the *American Airlines* case is this case (Plaintiffs' Brief, p. 4, n. 6). It is not. The two cases are similar, and for periods of time were consolidated for certain purposes, and some joint orders issued. But they are two separate cases with significant differences. For example, in *American* an EEOC charge was filed as early as 1967, whereas here no charge was filed until 1970. *See, ALSSA* v. *American Airlines*, 573 F.2d 960, 962, n. 2 (7th Cir. 1978).

4. Plaintiffs' statement that there are only 172 plaintiffs to be absorbed into a work force of 6,963 is wrong (Plaintiffs' Brief, p. 5). At the time the district court approved the settlement it was estimated that 205 class members would be returning to the work force with full retroactive competitive seniority.[2] Since that time other former flight attendants have surfaced claiming class membership and desiring to return to work. In addition, there are at least 78 class members who have already returned to the work force who stand to gain significant amounts of seniority pursuant to this settlement. Thus, if the settlement is implemented current flight attendants will be lowered as much as 300 rungs on the seniority ladder. Further, the size of the actual work force, which was slightly in excess of 6,000 at the time of the settlement has shrunk to approximately 5,600 due to current economic conditions.[3]

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[2] This figure included an estimated 33 Sub-Class A members.

[3] The 6,963 flight attendants Plaintiffs refer to include many people not in the work force: flight attendants on leave, furlough, supervisor status, etc.

5. More serious is Plaintiffs' inaccurate statement that no incumbent flight attendant can be "forced out of her job" or required to transfer pursuant to this settlement; and that the only flight attendants on furlough who will be forced to "await recall" due to the settlement are those not hired as of the date of the settlement agreement (Plaintiffs' Brief, p. 5). While it is true that under the settlement class members will not be re-employed until a vacancy exists, they receive preference for such vacancies over flight attendants on furlough; and there are currently more than 400 flight attendants on furlough who were employed *before* the settlement agreement. Many of these flight attendants have been on furlough since October of 1979; and they will lose their employment permanently if not recalled within three years from date of furlough (App. 63a-64a).[4] Moreover, once the Plaintiffs return, those flight attendants lowered on the seniority ladder will be placed much closer to the serious threat of furlough.

Similarly, Plaintiffs' theory that no flight attendants will be forced to transfer because of the settlement assumes that TWA's headcount only increases, which it obviously does not. For example, if a domicile presently staffed by 300 flight attendants is increased to 310, and ten class members fill these positions, any subsequent reduction in force below 310 will displace incumbent flight attendants (because of Plaintiffs' seniority). These flight attendants will be forced to transfer to another domicile (if they have enough seniority) or be furloughed.

THE "SECOND SUIT" THEORY

Plaintiffs contend that the otherwise fatal jurisdictional defects in the basic 1970 lawsuit are cured by the filing of a "second suit" in 1974. The second suit attacks

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[4] This refers to the Appendix to our Petition.

the aborted settlement of the first action on the theory that the settlement agreement constituted retaliatory conduct prohibited by Title VII because it failed to include retroactive seniority between dates of termination of and reinstatement to employment.

This unusual theory has never been mentioned by the district court, the Seventh Circuit, or by TWA. Plaintiffs mention it only in their Summary of Argument (Plaintiffs' Brief, p. 7) and in their Conclusion (Plaintiffs' Brief, p. 15). It is not found in the body of Plaintiffs' argument. Indeed, this argument is so strange that we hesitate to dignify it with a response. Nonetheless, out of an abundance of caution, we will briefly reply.

First, Plaintiffs' assertion that "no dispute over jurisdiction has ever existed" in the second suit (Plaintiffs' Brief, p. 3) is, at the very least, misleading. *Neither defendant has even filed an Answer.* Both defendants have filed motions to dismiss which are still pending. TWA has certainly never conceded jurisdiction. In addition to the open question of jurisdiction, numerous other questions abound as to the viability of the second suit. For example, at the time of the first settlement, TWA and Plaintiffs were not in an employer-employee relationship and thus it is difficult to comprehend what could be the basis for any Title VII charge. See, 42 U.S.C. § 2000e-3(a).

Second, even if Plaintiffs could prevail on the second suit, there is no reason to believe that this would enable them to obtain retroactive competitive seniority. As this Court stated in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the scope of relief under Title VII is intended to make victims whole by restoring them to a position where they would have been were it not for the unlawful discrimination. This standard would foreclose employment-related relief in the second suit. If the first settlement had never been attempted Plaintiffs would remain merely former employees with time-barred claims.

Third, the second suit was filed long before the Seventh Circuit's decision in *Consolidated*. Nonetheless, the Seventh Circuit determined that the claims of 92% of the class were jurisdictionally barred, tacitly yet clearly rejecting the second suit bootstrap argument.[5] Plaintiffs' Petition for *Certiorari* (No. 78-1545), arguing the existence of jurisdiction, makes no mention of the second suit. Clearly, if the second suit could somehow provide jurisdiction for this settlement, it could also provide jurisdiction for the merits.

Finally, the second suit cannot serve as a basis for a grant of seniority because a necessary party is missing. The old union is a defendant in the second suit, yet neither the old union nor the new union are parties to a settlement which overrides the contractual rights of IFFA and its members. Without the consent of the Union, or a finding that Title VII has been violated, the court cannot grant seniority. The arguments advanced in our Petition (pp. 18-26) apply here with even more force.

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[5] Previous counsel for Plaintiffs testified that a major reason for entering into the first settlement was the likelihood that the Title VII time limits would preclude most Plaintiffs from obtaining relief. He was correct. The Seventh Circuit subsequently held 92% of the claims barred because of time-filing defects. Not only did Plaintiffs fail to gain interim seniority under the *Consolidated* opinion; they also were denied the reinstatement with seniority to date of termination which the first settlement offered. Clearly, for 92% of the class, the first settlement was far superior to anything obtained through subsequent litigation. (It was also superior to the second settlement, since Plaintiffs remained out of work an additional eight years merely to obtain $3,750 minus costs and attorneys fees). Incredibly, the current class representatives still accuse the prior class representatives of negotiating a "sellout settlement" (Plaintiffs' Brief, p. 14); while ironically arguing that the first settlement provides the jurisdiction to obtain through a second settlement what Plaintiffs could not obtain through litigation.

REPLY TO RESPONDENTS' ARGUMENTS CONCERNING JURISDICTION

1. Respondents cite only one case to support the holding that a settlement may provide jurisdiction where it is otherwise lacking: *Aro Corp.* v. *Allied Witan Company*, 531 F.2d 1368 (6th Cir. 1976) (Plaintiffs' Brief, p. 9). *Aro* dealt with a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure; the court's jurisdiction of the case which spawned the settlement was never in question. Moreover, the language Plaintiffs quote from *Aro* is followed by a single citation to *Meetings & Expositions, Inc.* v. *Tandy Corp.*, 490 F.2d 714 (2nd Cir. 1974). *Tandy Corp.* involved the waiver of *personal jurisdiction* pursuant to a settlement, not subject matter jurisdiction.

2. Plaintiffs' "estoppel" argument (Plaintiffs' Brief, pp. 13-14) is unsound and unsupported by the facts. It is curious, however, that Plaintiffs raised precisely the same argument against TWA in their Petition for *Certiorari*.[6] Thus, Plaintiffs have argued that the same issue on one hand provides a strong reason for granting their petition, but on the other provides reasons for denying *certiorari* here. The inconsistency is obvious; as is the inconsistency in Plaintiffs' position that the only issues in this case worthy of review by this Court are the ones Plaintiffs choose to present.

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[6] See the Petition for *Certiorari* in Case No. 78-1545, p. 9.

REPLY TO RESPONDENTS' ARGUMENTS CONCERNING THE RIGHTS OF UNIONS AND INCUMBENT EMPLOYEES PURSUANT TO TITLE VII SETTLEMENTS

In our Petition (pp. 18-26) we demonstrated that this case presents an important issue regarding the rights of unions and incumbent employees in Title VII settlements to which they are not parties; and that conflict exists among the circuits on this issue (pp. 22-25). The Briefs in Opposition are silent on this split of authority. Plaintiffs, however, try to dodge the issue by alleging (Plaintiffs' Brief, p. 12) that the district court has made a "finding" which is sufficient to support a class-wide grant of seniority. That "finding", of course, was reversed as to 92% of the class by the Seventh Circuit *Consolidated* opinion. It is ludicrous to contend that the rights of the Union and the incumbent employees are governed by a "finding" which has been reversed. Rather, the law is that the remedy of competitive seniority is not available until "after a violation has been proved." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977). A violation has not been "proved" when plaintiffs enter into a settlement after losing at the Court of Appeals. The reason a violation could not be "proved" in *Evans* was that plaintiffs there could not meet the time limits. The same is true here.

Plaintiffs also contend that "Acceptance of the Union's argument would mean that there could never be a settlement of the liability aspects of a Title VII case" (Plaintiffs' Brief, p. 12, n. 13). Nonsense. It would mean only that where liability has not been proved and the Union is not a party to the settlement, the company and the plaintiffs could not agree to grant the plaintiffs competitive seniority.

CONCLUSION

Respondents have urged that the writ be denied so that the settlement will not be frustrated. But settlements which abrogate the legitimate seniority rights of incumbent employees on behalf of individuals who have failed to prove a violation of Title VII should be frustrated. The writ should be granted.

Respectfully submitted,

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